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No. 816

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

JANE G. KELLY, *Petitioner*

v.

AGNES J. REEVES GREER, MELLON NATIONAL BANK AND TRUST COMPANY, and PITTSBURGH NATIONAL BANK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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AGNES J. REEVES GREER, MELLON NATIONAL BANK AND TRUST COMPANY, and PITTSBURGH NATIONAL BANK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Jane G. Kelly, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on September 7, 1966, in appeals brought below[1] by the petitioner from an order of the United

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[1] Captioned *Jane G. Kelly* v. *Agnes J. Reeves Greer and Mellon National Bank and Trust Company*, Jane G. Kelly, Individually and/or on behalf of her children, Richard Greer Raese, John Reeves Raese, David Aubrey Raese and Jane Kelly, Appellants (No. 15,372), and *Jane G. Kelly* v. *Agnes J. Reeves Greer and Pittsburgh National Bank*, Jane G. Kelly, Individually and/or on behalf of her children, Richard Greer Raese, John Reeves Raese, David Aubrey Raese and Jane Kelly, Appellants (No. 15,373).

States District Court for the Western District of Pennsylvania in consolidated actions there instituted.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit upon reargument (App. A, *infra,* pp. 1a-7a) was reported in 365 F. 2d 669. Neither the memorandum order of the United States District Court for the Western District of Pennsylvania entered on April 14, 1965 (App. B, *infra,* pp. 9a-11a) which the Court of Appeals affirmed nor the per curiam affirmance thereof prior to reargument (App. A, *infra,* p. 8a) have been reported. The District Court order followed remand by the Court of Appeals pursuant to its opinion issued upon earlier appeals (App. C, *infra,* pp. 12a-16a) which was reported in 334 F. 2d 434. The opinion of the Court of Appeals for the Fifth Circuit (App. D, *infra,* pp. 17a-20a) in a related proceeding is reported at *Kelly* v. *Greer,* 354 F. 2d 209.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit affirming the District Court's memorandum order was entered on September 7, 1966 (App. A, *infra,* p. 8a) upon reargument granted by order dated April 29, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1332 and 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

The petitioner brought two ancillary actions in the District Court following the refusal by her mother, Agnes J. Reeves Greer, the individual party defendant in two original actions petitioner had there instituted, to comply with the terms of a settlement stipulation

and agreement which triggered dismissal with prejudice of petitioner's original actions.

The first ancillary action was brought, after respondent resisted preliminary attempts by petitioner to enforce the settlement, to recover damages resulting from acts of the respondent in fraudulently inducing petitioner to enter into the agreement or in the alternative for her mother's willful non-compliance. The second ancillary action was commenced to obtain a declaratory judgment of the settlement agreement's validity and enforceability which respondent refused to acknowledge after the claim for damages was instituted and during the course of pretrial proceedings thereon (I: 55a, 59a).[2]

In its first opinion on appeals brought by petitioner from an order dismissing both ancillary complaints for lack of jurisdiction, the Court of Appeals (334 F. 2d 434, App. C, *infra,* pp. 12a-16a) held, *inter alia,* that the question of breach of the agreement was a matter for determination by the District Court. Upon remand, that Court refused to entertain petitioner's demand for a trial of the issues of breach of contract by denying her motion to calendar her damage claim for jury trial. Instead it directed that the agreement

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[2] Record references are to the appendices of petitioner (the appellant below) which were filed in the Court of Appeals and which have been certified pursuant to Rule 21(3) of the Rules of this Court. Leave was granted by the Court of Appeals to use the appendices filed on the earlier appeals (Nos. 14800 and 14801) upon the later appeals (Nos. 15372 and 15373) for which supplemental appendices were printed. The appendices on both appeals have been certified to this Court.

The references to petitioner's first Appendix are preceded by the Roman numeral I; those to the supplemental Appendix, by the Roman numeral II.

be carried out pursuant to a schedule of the steps to be taken by the parties to the settlement and the dates for such compliance. On appeals taken by the petitioner from the latter order, the Court of Appeals first affirmed without opinion, but upon reargument held that the affirmance was without prejudice to petitioner to subsequently apply to the District Court for any damages she might have sustained as a result of the claimed breach. (App. A, *infra*, p. 7a)

The question presented is whether the petitioner may, notwithstanding a proper demand on her part, be deprived of the right guaranteed to her by the Seventh Amendment to the Constitution of the United States, from obtaining a trial by jury to determine whether petitioner was fraudulently and maliciously induced to enter into a settlement agreement, or, if the respondent initially acted in good faith, whether her subsequent acts and conduct resulted in a breach for which petitioner may have an assessment of damages by a jury. Under the memorandum order sought to be reviewed, petitioner is deprived of her right to elect her remedy since the court, without application of either party, has directed that the settlement agreement be specifically enforced.

CONSTITUTIONAL PROVISION INVOLVED

Amendment VII of the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF CASE.

For more than ten years petitioner, Jane G. Kelly, and her mother, Agnes J. Reeves Greer, have been the principal participants in bitter family litigation in numerous actions instituted in the state and federal courts of five states. The two underlying actions here involved were instituted in 1959 and 1961 by petitioner in the United States District Court for the Western District of Pennsylvania. In January, 1963, the actions, which had been consolidated, were dismissed with prejudice pursuant to a comprehensive settlement agreement that on its face was intended to resolve matters in dispute between the two parties encompassing substantial property over and above that which was the subject of the two actions (I: 43a-50a).

This petition arises out of a second appeal from the affirmance of an order of the District Court denying petitioner her right to a jury trial demanded on her first ancillary claim for damages for breach of the settlement agreement.

Basis of Original Jurisdiction.

At the time of the commencement of the original actions the petitioner was a citizen of Florida and the respondent a citizen of West Virginia (I: 28a). On October 29, 1959, the petitioner brought an action in the District Court for the Western District of Pennsylvania against the respondent and Mellon National Bank and Trust Company (Civil Action No. 18265) (I: 28a). On February 28, 1961, petitioner brought a second action, this one against respondent and Pittsburgh National Bank (Civil Action No. 61-131) (I: 36a). The first action sought an adjudication of peti-

tioner's rights in certain shares of stock in the possession of the Mellon Bank; the second was to recover dividends on deposit in the Pittsburgh Bank in respondent's name.[3]

Subject matter jurisdiction in both actions was predicated on diversity of citizenship and amount in controversy, and service and venue were based on 28 U.S.C. § 1655. The actions were consolidated in May, 1961.[4] The litigation was vigorously pressed by both parties from its inception as is evidenced by the listing of docket entries of both actions which occupies 27 printed pages of the appendix on the first appeal (I: 1a-27a).[5] The settlement agreement entered into after extensive discovery and pretrial proceedings was a 12-page typewritten document that was approved by the parties before it was read into the record before

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[3] The banks were made parties defendant only because they were holders of the property subject to claim. The dividend proceeds which were released to the respondent after the settlement was entered into were restored pursuant to the judgment of the Third Circuit following the first appeal.

[4] Respondent's unsuccessful appeal from the order of consolidation is reported in *Kelly* v. *Greer*, 295 F. 2d 18 (CA 3).

[5] The dismissals extended to the corporated entities and persons controlled by the litigants as may be seen from the captions of suits enumerated in the agreement and by the spirit of compromise it evinced (I: 47a). Among the actions referred to were *Greer* v. *Kelly*, Circuit Court, Palm Beach County, Florida, In Chancery No. 37-753-D; *Preston County Supply Co.* v. *Preston Corporation*, U.S.D.C. Del., Civ. Action No. 2200; *Raese* v. *Preston County Supply Co.*, Circuit Court, Preston County, West Virginia, In Chancery No. 6015; *Preston County Coke Co.* v. *Preston County Light and Power Co.*, reported at 146 W. Va. 231, 119 S.E. 2d 420; *Kelly* v. *Greer Steel Co.*, reported at 309 F. 2d 786 (CA 6). The reported cases were under preparation for review by this Court at the time the settlement was effected.

the trial judge. Its scope was not limited to the property initially involved in the two actions but was a comprehensive disposition of numerous other disputed assets located in several states. It provided, in part, for the creation by the respondent of trusts for the benefit of both litigants and petitioner's children and contemplated the immediate dismissal of all pending actions (including the two District Court actions and suits pending in Florida, West Virginia, Ohio and Delaware) as well as the exchange of general releases by the parties (I: 43a-50a).

Petitioner's Efforts To Enforce the Settlement.

The petitioner promptly moved to and did terminate all litigation she had initiated and agreed to and did release unconditionally to the respondent the property involved in Civil Action No. 61-131 (I: 51a, 52a).[6] But respondent from the outset failed to comply with her obligations under the agreement. The petitioner first attempted to obtain compliance by motion filed in the District Court on March 11, 1963, to vacate the dismissals of the original actions and to reinstate the cases to the active docket of the court to enforce the

[6] The consolidated actions were dismissed the night the settlement agreement was entered into, and immediately upon its being read into the record. Petitioner thereafter took steps to effect dismissal with prejudice of the suit she had had instituted in the federal court in Delaware and gave letter notice to the Clerk of this Court that she would not proceed to seek review of judgments adverse to her interests entered in the Supreme Court of Appeals of West Virginia and in the United States Court of Appeals for the Sixth Circuit.

Release of the property held in Civil Action No. 61-131 to respondent was temporarily delayed until a lien asserted thereon by an attorney was dismissed.

settlement agreement.[7] Respondent opposed the motion by challenging the court's jurisdiction and by alleging, *inter alia,* that the settlement was merely an unenforceable accord and satisfaction, (I: 53a-54a)[8] whereupon petitioner withdrew her motion and filed her first ancillary complaint for damages for breach of the agreement (I: 55a-57a).

On July 9, 1963, after respondent's attorneys categorically refused to acknowledge, at the request of the trial judge, the validity and binding effect of the settlement agreement, petitioner filed a second ancillary complaint for a judgment declaring that the agreement constituted a valid and enforceable contract (I: 59a-60a). The respondent moved to dismiss both ancillary complaints for lack of personal service and improper venue (I: 58a, 61a-62a) and petitioner moved for summary judgment on her second complaint (for declaratory judgment) (I: 63a-85a). On October 17, 1963, the District judge granted respondent's motion to dismiss on the ground that the settlement was not enforceable because of the absence of jurisdiction (I:

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[7] The first post settlement problem arose by reason of respondent's flat refusal, except upon the imposition of new conditions, to dismiss the action she had instituted in the Florida state court in 1957, in which she obtained an injunction excluding the petitioner from entering upon a valuable parcel of improved property which for many years had been titled in petitioner's name. Respondent thereafter successfully opposed petitioner's attempts to gain possession by way of a writ of assistance (App. D, *infra,* pp. 17a-20a, 354 F. 2d 209) and by motions for injunctive relief pendente lite which were filed in the District Court on December 7, 1964, and, as amended, on January 18, 1965, and in the Third Circuit on May 10, 1965 (II: 1a, 3a, 43a-51a).

[8] The District Court in finding that the agreement was binding on both parties (App. B, *infra,* p. 11a) effectively disposed of the contention that the agreement was not an enforceable contract.

91a-95a, 104a). Petitioner's appeal from that order of the Court of Appeals for the Third Circuit constituted Nos. 14,800 and 14,801 of that Court.

Proceedings on the Prior Appeal.

Upon the appeal, respondent argued that the original actions having been originally *in rem,* the removal of the res and its restoration to respondent in accordance with the terms of the settlement, deprived the trial court of jurisdiction to entertain either of the ancillary complaints. In reversing and remanding, the Court held, in an opinion by Staley, J., 334 F. 2d 434 (App. C, *infra,* pp. 12a-16a) that the trial court had jurisdiction to vacate the dismissal orders, and, without deciding the jurisdictional issue over the person of the respondent, directed the lower court to vacate its orders of dismissal of the original actions, to reinstate the original actions as of immediately prior to the entry of the dismissal orders, i.e., following the reading into the record of the settlement agreement but prior to the orders dismissing the action, and to proceed to determine whether the respondent, in agreeing to the plan of settlement and using it as the *quid pro quo* for obtaining the dismissals of the actions, submitted to the court's personal jurisdiction. And it referred for that court's determination the question whether the settlement agreement was an unenforceable executory accord and satisfaction and which party had breached it.

The Proceedings upon Remand.

The state of the record upon remand to the District Court included the pendency of both of petitioner's ancillary complaints—one for declaratory judgment and the other requesting a jury trial on the

issue of damages for breach of contract. Apart from a motion for injunctive relief, petitioner sought only to move forward on her two complaints by moving to calendar her ancillary claims for jury trial (II: 52a-53a) and to correct the dismissal orders by incorporating therein, as a consent judgment, the settlement agreement which the parties had entered into (II: 41a-42a). Although no motion for specific enforcement was pending petitioner was pressed by the court to elect then and there between enforcement and her action for breach of agreement. Petitioner's counsel took the position that petitioner should first have a decision as to the enforceability of the agreement.

On April 14, 1965, the District Court entered its memorandum order which is the subject of this petition in which all of petitioner's motions were denied without findings of fact or conclusions of law, except that it found that the agreement was binding on the parties, and assumed *in personam* jurisdiction by ordering specific performance of the agreement in accordance with a specified time schedule.

Proceedings on Later Appeal.

Petitioner's appeals from the April 14, 1965, order of the District Court were calendared as Nos. 15372 and 15373. The Court of Appeals after hearing argument entered a per curiam order on January 4, 1966, affirming the District Court. On petition for reargument and for the issuance of an opinion that Court restated its affirmance with the proviso that it was without prejudice to petitioner to make subsequent application to the District Court "for any damages she might have sustained as a result of any breach by the defendant of the 'Agreement'". The Court

stated that the District Court was not by its memorandum order selecting petitioner's remedy for her but summarily enforcing a settlement agreement entered into with its approval. This petition for a writ of certiorari seeks a review of the judgment of affirmance entered by the Court of Appeals for the Third Circuit on September 7, 1966.

REASONS FOR GRANTING THE WRIT

Implicit in the decision of the Court of Appeals is the determination that the settlement agreement constituted an inherent part of the judgment or decree of the District Court which the latter could enforce notwithstanding the pendency of petitioner's claim of breach. That implication is not consistent with the District Court's denial of petitioner's motion to incorporate the settlement agreement into the orders of dismissal so as to make it an integral part of such orders. It is also in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Kelly* v. *Greer*, 354 F. 2d 209 (App. D, *infra*, pp. 17a-20a) which affirmed an order of the District Court for the Southern District of Florida vacating a writ of assistance petitioner obtained to effect respondent's compliance with that part of the settlement providing for restoration of the Florida properties to petitioner (I: 43a, 108a-111a). In its opinion, the Fifth Circuit interpreted the direction of the Third Circuit (upon the prior appeal in 334 F. 2d 434, App. C, *infra*, pp. 12a-16a) to restore the original consolidated actions "to the status quo existing immediately prior to the entry of the order of dismissal, i.e., following the reading into the record of the settlement agreement but prior to the orders dismissing the action" as eviscerating from those orders the base upon which a consent judgment could

rest, and it said that it was "clear" that there is not "now" a "judgment" upon which a writ of assistance might issue.

The apparent conflict in interpretation of what occurred in the District Court thus raises the question whether the settlement constitutes an integral part of the judgment or whether it is merely an agreement, already been held binding upon the parties, which is the foundation of rights and duties legally flowing from their acts in voluntarily entering into it.

We submit that the settlement, compliance with which respondent has resisted from its inception, represents a contract binding upon the parties and that petitioner's ancillary complaint for damages and respondent's answer thereto raise questions of fact that can be decided only by trial by jury by reason of petitioner's timely demand therefor. This Court has repeatedly held that the right of trial by jury guaranteed by the Seventh Amendment shall be protected from infringement by the federal courts. For recent cases, see *Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469; *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.,* 369 U.S. 355, 359-360; *Simler* v. *Conner,* 372 U.S. 221; *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500, 501; *Baltimore & Carolina Line, Inc.* v. *Redman,* 295 U.S. 654, 657. The policy of this Court in fostering protection of this constitutional right has been long maintained as one lending continuing strength to our system of jurisprudence. See *Parsons* v. *Bedford,* 3 Pet. 433, 446-449.

The Court of Appeals, by affirming the memorandum order of the District Court, has, notwithstanding settled precedent, denied petitioner her fundamental right to have the disputed issues of fact tried by a

jury in accordance with common law principles. This Court should grant the writ requested herein in affirmation of its expressed view that maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence as to render subject to utmost scrutiny any seeming curtailment of that right. *Dimick* v. *Schiedt*, 293 U.S. 474, 486; *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 501.

The reservation made by the Third Circuit after rehearing of a right in petitioner to make subsequent application to the District Court for damages as a result of the claimed breach of contract does not satisfy constitutional requirements. Respondent's refusal to comply with the terms of settlement has extended over a period now approaching four years during which petitioner has suffered and continues to suffer increasing and most substantial damages. Although her complaint has been pending since April, 1963 (and issue was joined the same month) she has yet to be given a hearing at the trial level although she has strenuously and repeatedly sought to obtain a jury trial to resolve the issues of breach and the damages incurred as a result thereof. The long period intervening has been occupied with procedural delays that led to the two appeals. At all times, respondent's refusal to take the first step in going forward with the settlement, namely, the unconditional dismissal of the Florida action, has been accompanied solely by verbal exhortations made on her behalf by her attorneys of her alleged willingness to comply, but significantly not by the required affirmative acts of compliance.

Apart from the amount of damages involved, the issues raised by the ancillary complaint and answer

pose two questions which may be resolved only by a jury: 1) whether respondent fraudulently induced petitioner to enter into the settlement,[9] and 2) whether the agreement, if entered into in good faith, was subsequently breached by respondent. Petitioner's right to elect the remedy she might pursue under Rule 8, Federal Rules of Civil Procedure, may properly be reserved until an appropriate jury finding has been made. The reservation of the Court of Appeals would thus foreclose petitioner from obtaining a jury determination of the circumstances surrounding the negotiations and execution of the settlement agreement and thus constituted approval of usurpation by the District Court of petitioner's right to choose the remedy she might seek to pursue in protection of her rights.

CONCLUSION

We submit that the obstacles impeding petitioner's efforts to secure redress over so long a period of time are not conducive to encouraging the settlement of lawsuits and the consequent amelioration of the burdens imposed upon the federal courts by the growing

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[9] The ancillary complaint alleges, *inter alia*, that respondent represented that she would in good faith comply with the terms of the agreement and would fully cooperate in the negotiations contemplated after its execution, that such representations were material and made falsely and maliciously with the intent to deceive and injure the petitioner, were known to be false when made and were relied on by the petitioner to her detriment and injury (I: 56a-57a). Respondent formally denied the allegations.

Respondent has never denied the sworn allegations of petitioner made on August 26, 1963 in support of her second ancillary complaint for declaratory judgment that respondent had entered into the settlement negotiations merely to avoid trial of the actions, that respondent's chief counsel (not counsel below) was "unhappy" with the settlement, and that respondent did not intend to carry out its terms (II: 19a).

amount of litigation. While this Court cannot return petitioner to the position she occupied when the settlement was made, nor erase the injuries she has since suffered, it can define her rights, resolve the patent inconsistencies raised by the decisions in the two Circuits and give firm directions for the prompt disposition of her claims. By such action, this Court would be taking an affirmative step to overcome the reluctance for settlement of litigated cases the history of this action will surely engender among practicing attorneys.

For the reasons stated, it is respectfully prayed that the writ of certiorari requested should issue.

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December, 1966.

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 15372

JANE G. KELLY, Individually and/or on Behalf of Her Children, RICHARD GREER RAESE, JOHN REEVES RAESE, DAVID AUBREY RAESE and JANE KELLY, *Appellants*

v.

AGNES J. REEVES GREER and MELLON NATIONAL BANK AND TRUST COMPANY

No. 15373

JANE G. KELLY, Individually and/or on Behalf of Her Children, RICHARD GREER RAESE, JOHN REEVES RAESE, DAVID AUBREY RAESE and JANE KELLY, *Appellants*

v.

AGNES J. REEVES GREER and PITTSBURGH NATIONAL BANK

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued December 10, 1965

Reargued May 19, 1966

Before STALEY, *Chief Judge* and KALODNER and FORMAN, *Circuit Judges*

OPINION OF THE COURT

(Filed September 7, 1966)

By KALODNER, *Circuit Judge*

These are appeals from a Memorandum Order of the District Court for the Western District of Pennsylvania entered April 14, 1965 dismissing all pending motions in

this action and requiring the parties to proceed to carry out the terms of a "Settlement Sitpulation" in accordance with the District Court's instructions. The Order was a consequence of a Mandate sent down by this Court, following our Opinion in these proceedings, 334 F.2d 434 (1964), which vacated earlier Orders of the District Court and remanded the cause for further proceedings.

Plaintiff, Jane G. Kelly, complains that the Memorandum Order of the District Court is improper in that it deprives her of her right to pursue her legal remedies. We find no merit in this contention.

For the purposes of this appeal, the history of this long, drawn-out litigation involving an intrafamily dispute between daughter, Jane G. Kelly, and mother, Agnes J. Reeves Greer, may be summarized as follows: In 1959 the present plaintiff brought an action in the Western District[1] against the present defendant and the Mellon National Bank and Trust Company seeking an adjudication regarding her rights in certain shares of stock of the Union Gas Company of Canada, Ltd. held by the Bank. In 1961 plaintiff brought a second action in the Western District against the defendant and the Pittsburgh National Bank to recover dividends deposited in the Pittsburgh Bank in defendant's name. Both of these suits were in rem actions, service of the defendant having been accomplished pursuant to 28 U.S.C.A. § 1655. In May 1961, the District Court consolidated the two actions, and this was upheld on appeal. Kelly v. Greer, 295 F.2d 18 (3 Cir. 1961).

There followed a period of extensive discovery and pretrial extending to January 1963. The parties then began negotiations to settle the litigation as well as all other existing disputes between them. From time to time, the

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[1] Plaintiff is a citizen of Florida and defendant is a citizen of West Virginia. Neither resides in the Western District but the property which is the subject of the suits is located there.

District Court assisted in these negotiations. On January 22, 1963 the parties advised the District Court that a settlement had been reached and submitted a "Stipulation and Agreement" which provided for a general resolution of all disagreements between the parties and called for the dismissal of all actions then pending between plaintiff and defendant. The "Stipulation and Agreement" was then made part of the record. Pursuant to its terms, counsel executed a Stipulation for the dismissal of the civil actions in the Western District, and the District Court entered an Order dismissing the suits with prejudice on January 23, 1963.

Execution of the "Agreement" was to be carried out in accordance with paragraph XX which read:

> "XX. Prior to March 1, 1963, the attorneys for the parties will draw up the definitive agreement needed to carry out the above plan and will establish a calendar for the transfer of assets or delivery of documents or dismissals needed. It is intended that the details of this settlement will be carried out before May 1, 1963, except that all pending suits shall be dismissed with prejudice forthwith."

Later, a dispute arose between the parties concerning compliance with the terms of the settlement agreement. On March 11, 1963 plaintiff filed a motion to vacate the dismissal Order and to compel performance of the "Settlement Stipulation." On April 5, 1963 this motion was withdrawn, and an ancillary complaint was filed seeking damages for alleged breach of the settlement agreement. On July 9, 1963 a second ancillary complaint was filed requesting a judgment declaring that the settlement agreement was valid and enforceable. Defendant moved to dismiss the complaints for lack of personal jurisdiction, and plaintiff moved for summary judgment on her second ancillary complaint. On October 17, 1963 the District Court dismissed

the complaints for lack of jurisdiction. Thereafter, plaintiff moved to vacate the dismissal Order of January 23, 1963. The motion was denied on November 13, 1963 and plaintiff appealed.

In Kelly v. Greer, 334 F.2d 434 (1964), we held that "the district court has jurisdiction to vacate its own orders of dismissal which were based upon the stipulation of the parties in reliance upon their settlement agreement." (334 F.2d at 436). We vacated "the orders of October 17 and November 13, 1963", and remanded "the cause to the district court with directions to vacate its orders dismissing the original actions and reinstate them to the status quo existing immediately prior to the entry of the orders of dismissal, i.e., following the reading into the record of the settlement agreement but prior to the orders dismissing the actions." (334 F.2d at 437)

In accordance with the Mandate of this Court, an Order was entered by the District Court on September 23, 1964 vacating its Orders of October 17 and November 13, 1963 and setting a time for a hearing on all matters presently pending in the litigation; viz., the question of reinstating plaintiff's original actions, and the status of plaintiff's two ancillary complaints and the motion for summary judgment. Prior to that hearing, plaintiff filed two additional motions; one for the entry of a consent judgment, *nunc pro tunc,* and the other for injunctive relief pendente lite.

On December 17, 1964, a hearing was held at which time the District Court dismissed the petition for injunctive relief and reserved ruling on the other pending motions. Subsequent to this hearing plaintiff filed an amended motion for injunctive relief and a motion to calendar her ancillary complaints for jury trial. On April 14, 1965 the District Court entered the Memorandum Order under review. This Order stated that "the parties are bound by the terms of the settlement stipulation read into the record on January 22, 1963", and that "it is hereby ordered that

the same be complied with." The District Court in the Order established a calendar to effectuate compliance.

Plaintiff has appealed from this Memorandum Order claiming that the District Court has selected her remedy for her. We do not agree. The Order is not an attempt to seek remedies for the parties involved in this litigation, but an exercise of the District Court's power to summarily enforce settlement agreements entered into with its approval. It is settled that the District Court acted within its powers.

In Cummins Diesel Michigan, Inc. v. The Falcon, 305 F.2d 721 (7 Cir. 1962), the Court stated:

> "Federal and State Courts have held under a great variety of circumstances that a settlement agreement or stipulation voluntarily entered into cannot be repudiated by either party and will be summarily enforced by the Court." (at 723)

In Main Line Theatres, Inc. v. Paramount Film Distributing Corporation, 298 F.2d 801 (3 Cir. 1962), cert. den. 370 U.S. 939, Judge Hastie in discussing the effect to be given to a settlement agreement said:

> "We are satisfied that the parties entered into a valid contract to settle, upon condition that the other suits also be settled. Thereafter, neither party was free to repudiate the agreement during the short period required to accomplish the settlement of the other suits." (at 804)

Similar expressions are to be found in the state courts. The Pennsylvania Supreme Court in reviewing a court's power over a settlement agreement in Melnick v. Binenstock, 318 Pa. 533, 179 Atl. 77 (1935) concluded that:

> "Where the right of one of the parties to such an agreement compromising pending litigation is contested, the true interpretation of the agreement should

> be found by the court in which the litigation was pending or if in equity within the terms of the decree entered in accordance with the compromise. . . . A compromise or settlement of litigation is always referable to the action or proceeding in the court where the compromise was effected; it is through that court the carrying out of the agreement should thereafter be controlled. Otherwise the compromise, instead of being an aid to litigation, would be only productive of litigation as a separate and additional impetus." (318 Pa. at 536, 179 Atl. at 78)

The District Court's Order is consistent with the above stated principle and with the Mandate of this Court. The litigation having been restored by our Mandate to a position where the "Stipulation and Agreement" had been read into the record but the suits not yet dismissed, the District Court quite properly ordered that both parties comply with it.

Finally, plaintiff's belief that the District Court's Order will deprive her of certain legal rights is without foundation. More particularly, plaintiff contends that the Memorandum Order prevents her from seeking damages she claims to have suffered by reason of alleged breaches of the "Stipulation and Agreement" by defendant following the dismissal of the suits on January 23, 1963.[2] The record of the December 17, 1964 hearing makes quite clear the District Court's readiness to hear the question of breach of the agreement. At that time, the trial judge said:

> ". . . I believe the Court of Appeals has recognized the fact that it is necessary to look into the question of who breached the agreement. I am perfectly willing to hear evidence, arguments or anything else on these points. . . ."

* * * *

[2] Defendant, of course, vigorously denies any such breaches.

"Mr. Arkin: 'Will your Honor impanel a jury for the issues with respect to breach if that is determined?'

"The Court: 'I would expect to do so if counsel requested it, probably an advisory jury.'"

We do not see how the Memorandum Order estops plaintiff from pursuing her remedies for breach of the settlement agreement and the granting of appropriate relief. See All States Investors, Inc. v. The Bankers Bond Company, Inc., 343 F.2d 618, 624 (6 Cir. 1965), cert. den. 382 U.S. 830.

For the reasons stated, the Memorandum Order of the District Court will be affirmed without prejudice to the plaintiff to make subsequent application to the District Court for recompense for any breach by defendant of the "Agreement".

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

* * * * * * * * * *

Present: STALEY, *Chief Judge,* and KALODNER and FORMAN, *Circuit Judges.*

Judgment

These causes came on to be heard on the records from the United States District Court for the Western District of Pennsylvania and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the Order of the said District Court, filed April 14, 1965, be, and the same is hereby affirmed, with costs, without prejudice to the plaintiff to make subsequent application to the District Court for recompense for any damages she might have sustained as a result of any breach by defendant of the "Agreement."

ATTEST:

M. ELIZABETH FERGUSON
Deputy Clerk

September 7, 1966

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

• • • • • • • • • • •

Opinion of the Court

(Filed January 4, 1966)

PER CURIAM:

On review of the record we find no error. The District Court's Memorandum Order entered April 14, 1965 will be affirmed.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil No. 18265

JANE G. KELLY, *Plaintiff*

v.

AGNES J. REEVES GREER and MELLON NATIONAL BANK AND TRUST COMPANY, *Defendants*

Civil No. 61-131

JANE G. KELLY, *Plaintiff*

v.

AGNES J. REEVES GREER and PITTSBURGH NATIONAL BANK, *Defendants*

Memorandum Order

The above actions were instituted to try title to certificates for 14,820 shares of stock of the Union Gas Co. of Canada, Ltd., in the name of the defendant and in the possession of the Mellon National Bank & Trust Co., Pittsburgh, Pa., and to a bank account of $124,000.00 in the name of the defendant and on deposit with the Pittsburgh National Bank, Pittsburgh, Pa. Service was effected under the provisions of 28 *U.S.C.A.*, § 1655, and the actions which had been consolidated for trial proceeded in rem. The trial which had been scheduled for the January 1963 trial term was continued to allow the parties to negotiate a settlement. On January 22, 1963, a settlement stipulation was read into the record and the actions were dismissed.

On March 11, 1963, plaintiff moved to vacate these orders of dismissal on the ground that the defendant had failed to perform her obligations thereunder. The relief sought was to restore the actions to the active docket and compel the

defendant to comply with the terms of the settlement stipulation. Before the motion could be heard and ruled upon, the plaintiff withdrew it, and filed, on April 5, 1963, her first ancillary complaint for damages for breach of contract (the settlement stipulation) in the amount of $15,000,000.00. On May 28, 1963, defendant moved to dismiss on jurisdictional grounds. On July 9, plaintiff filed a second ancillary complaint seeking a declaratory judgment that the settlement stipulation was a valid and enforceable contract. On July 29, defendant moved to dismiss and on August 27, plaintiff moved for summary judgment on the second ancillary complaint. The parties were heard on their various motions and on October 17, 1963, this court, concluding that it was without jurisdiction, denied plaintiff's motion for summary judgment and dismissed the ancillary complaints. Thereafter on October 28, 1963, plaintiff moved to vacate the original dismissals of January 22, 1963, *not* for the purpose of reinstating the original actions, but to enable the plaintiff to proceed to a trial on the merits of her ancillary complaints. The motion was denied November 13; and the plaintiff appealed.

The Court of Appeals reversed and remanded with instructions to vacate the orders dismissing the original actions and to reinstate these actions to the status quo existing immediately after the reading into the record of the settlement stipulation but prior to the orders of dismissal. Accordingly the orders of dismissal were vacated on September 23, 1964.

Plaintiff has filed, since the appeal, a motion for summary judgment on her second ancillary complaint, a motion for injunctive relief pendente lite, a motion to correct the January 22, 1963 orders of dismissal by incorporating therein in the form of a consent judgment the settlement stipulation, and a motion to calendar her ancillary claims for trial.

AND NOW, this 14th day of April, 1965, upon due consideration it appearing that the parties are bound by the terms of the settlement stipulation read into the record on January 22, 1963, it is hereby ordered that the same be complied with as follows:

1. On or before May 1, 1965, the parties will effect the dismissal of all pending suits comprehended by the stipulation;

2. On or before May 10, 1965, plaintiff will return to defendant, with a copy to the court, her comments, objections or proposed amendments to the draft agreements which have been submitted by the defendant to the plaintiff; or in the alternative, plaintiff shall submit to the defendant by said date such proposed trust agreements and other documents as are necessary to implement the settlement stipulation;

3. Within 30 days after receiving said documents defendant shall send to plaintiff, with a copy to the court, her comments, objections, or proposed amendments to plaintiff's proposals or drafts;

4. On June 2, 1965, at 10 A.M., the parties shall appear before this court to report whether they have agreed upon the terms of the basic agreements called for by the stipulation. They shall be prepared to discuss and conciliate any differences concerning said documents which may then exist. They shall further be prepared to exchange on said date, a list of proposed Trustees and to select the needed Trustee or Trustees from said list.

Plaintiff's motions for summary judgment, for injunctive relief, to correct the January 22, 1963 orders of dismissal, and to calendar her ancillary claims for trial are hereby denied.

S/ HERBERT P. SORG *D.J.*

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 14800

JANE G. KELLY, *Appellant*,

v.

AGNES J. REEVES GREER and MELLON NATIONAL BANK AND TRUST COMPANY

No. 14801

JANE G. KELLY, *Appellant*,

v.

AGNES J. REEVES GREER and PITTSBURGH NATIONAL BANK

On Appeals from the United States District Court for the Western District of Pennsylvania

Argued June 19, 1964

Before McLAUGHLIN, KALODNER and STALEY, *Circuit Judges*

Opinion of the Court

(Filed July 20, 1964)

By STALEY, *Circuit Judge*

Basing jurisdiction on diversity of citizenship and amount in controversy, the plaintiff filed two separate civil actions in the United States District Court for the Western District of Pennsylvania requesting an adjudication that certain shares of stock and proceeds from dividends held by two Pittsburgh banks for the benefit of the defendant were her property. Both answers of the individual defendant, Agnes J. Reeves Greer, contested the jurisdiction of the court over her person. However, since the property involved in the dispute was within the district, this defendant was served with process in accordance with the

lien enforcement provision of the Judicial Code. 28 U.S.C. § 1655 (1958 ed.). We affirmed the order of the district court consolidating the two suits for trial. Kelly v. Greer, 295 F.2d 18 (C.A. 3, 1961).

Following extensive pretrial proceedings, the parties informed the district court that a settlement appeared imminent. Accordingly, the trial judge continued the case from day to day in January 1963 in the hope that a settlement could be effected although the case had been called for trial. Finally, on January 22, 1963, the parties agreed to a plan of settlement. This plan embraced the settlement, not only of the original suits filed by the plaintiff, but of the underlying, bitter intra-family controversy which had given rise to several other suits between this plaintiff daughter and her defendant mother.

In order to accommodate the parties, the district judge remained in his chambers during the evening of January 22. About 10:00 P.M. that evening the plaintiff and counsel for both parties met in the chambers of the district judge and, in the presence of the court, read into the record the settlement agreement which had been reached. The particulars of this detailed compromise plan need not be recited here, but the concluding paragraph reads:

> "XX. Prior to March 1, 1963, the attorneys for the parties will draw up the definitive agreement needed to carry out the above plan and will establish a calendar for the transfer of assets or delivery of documents or dismissals needed. It is intended that the details of this settlement will be carried out before May 1, 1963, except that all pending suits shall be dismissed with prejudice forthwith."

In accordance with the last quoted sentence, counsel for both sides then executed a stipulation for dismissal of both civil actions and the district court ordered their dismissal

with prejudice that very evening pursuant to the stipulation. Plaintiff later consented to the removal of the property involved in one of the suits from the Western District of Pennsylvania and dismissed various civil actions which she had filed in other parts of the country.

Subsequently, on March 11, 1963, plaintiff, alleging that defendant had refused to comply with the settlement, filed a motion to vacate the dismissal of the original suits, reinstate the cases to the active docket, and enforce the settlement agreement. The defendant answered, challenging the jurisdiction of the court over her person. The plaintiff thereupon withdrew her motion, and on April 5, 1963, filed an "Ancillary Complaint" seeking damages for the alleged breach by the defendant of the settlement agreement. A second "Ancillary Complaint" was filed on July 9, 1963, requesting a declaratory judgment that the settlement agreement constitutes a valid and enforceable contract between the parties. Following oral argument, the district court on October 17, 1963, granted the defendant's motions to dismiss the ancillary complaints and denied plaintiff's motion for summary judgment. The court ruled that:

> "In these cases, the principal actions were settled and were dismissed by the court with prejudice to the plaintiff on the stipulation of the parties. No judgment was entered by the court in the principal actions and the property on which the court's jurisdiction was based is no longer within the control of the court. This court has no jurisdiction with respect to either of plaintiff's present actions."[1]

On November 13, 1963, a motion for rehearing was denied, as was a motion to vacate the original orders of dismissal. These appeals were taken from the orders of October 17 and November 13, 1963.

---

[1] The opinion of the district court has not been reported.

Of course the district court has jurisdiction to vacate its own orders of dismissal which were based upon the stipulation of the parties in reliance upon their settlement agreement. Rule 60(b), Fed. R. Civ. P. However, the district court appears to have been of the view that the dismissal of the original actions with prejudice deprived it of jurisdiction to entertain the ancillary complaints seeking enforcement of the settlement agreement. But there can be no question of the power of a Federal district court to vacate its own orders entered in civil actions over which it had original jurisdiction "whenever such action is appropriate to accomplish justice." Klapprott v. United States, 335 U.S. 601, 615 (1949). And the defendant does not dispute the subject matter jurisdiction of the district court in the original actions, although she still questions the court's jurisdiction over her person despite the fact that she personally agreed to the settlement plan which was the basis for the dismissal of the suits.

We find it unnecessary to resolve this issue of personal jurisdiction because of the disposition we make of these appeals. For, in these circumstances, we shall vacate the orders of October 17 and November 13, 1963, and remand the cause to the district court with directions to vacate its orders dismissing the original actions and reinstate them to the status quo existing immediately prior to the entry of the orders of dismissal, i.e., following the reading into the record of the settlement agreement but prior to the orders dismissing the actions. Of course, this will require the defendant to return any property to the Western District of Pennsylvania which was the subject of the original actions and which has been removed from that district. The district court can then proceed to determine whether the defendant, in agreeing to the plan of settlement which was read into the record and using it as the *quid pro quo* for obtaining the dismissal of these and other civil actions,

submitted to the jurisdiction of the district court over her person.[2]

The orders of the district court will be vacated and the cause remanded for further proceedings in conformity with this opinion.

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[2] The defendant has urged that the settlement agreement is merely an executory accord and satisfaction; that it is the plaintiff who has breached the agreement; and that the plaintiff in her ancillary complaints seeks relief which is beyond that embraced in the original suits. With regard to the latter contention, we are merely ordering the reinstatement of the original actions, although this shall include the status existing at the time the settlement agreement was read into the record. With respect to the first two arguments, these are matters for the determination of the district court following remand.

APPENDIX D

UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

No. 21513

JANE GREER KELLY, *Appellant,*

v.

AGNES J. REEVES GREER ET AL., *Appellees.*

Dec. 9, 1965

* * * * * * * * * * *

Before BROWN, WISDOM and THORNBERRY, Circuit Judges.

THORNBERRY, Circuit Judge:

This appeal is taken from an order quashing a writ of assistance in the United States District Court for the Southern District of Florida. The writ of assistance was issued by a deputy clerk pursuant to an application by appellant. The application recited that a "consent judgment" had been entered in the United States District Court for the Western District of Pennsylvania, and that this "consent judgment" called for the dismissal of an action between the parties pending in a Florida Circuit Court. The application further stated that appellee Greer had refused to comply with the terms of the "judgment". The application was made pursuant to 28 U.S.C. 1963.

We hold that there was no judgment upon which the writ of assistance could issue, and therefore affirm the order of the District Court.

The initial question to be determined is whether the order quashing the writ is an appealable order. We hold that the order constitutes a "final decision" within the meaning of 28 U.S.C. § 1291, and is therefore appealable. The order is somewhat analogous to an order granting a motion to quash service, which has been held to be final and appealable in numerous cases. See Cook v.

Bostitch, Inc., 2d Cir. 1964, 328 F.2d 1; Edwin Raphael Company v. Maharam Fabrics Corp., 7th Cir. 1960, 283 F.2d 310; Butler v. Ungerleider, 2d Cir. 1951, 187 F.2d 238. Furthermore, the Supreme Court has recently stated that a "final decision" within the meaning of § 1291 "does not necessarily mean the last order possible to be made in a case," and that the requirement of finality is to be given a "practical rather than a technical construction." Gillespie v. United States Steel Corp., 1964, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199.

We thus pass to the question of whether there was a judgment entitled to registration under 28 U.S.C. § 1963. The "judgment" upon which the writ was issued consisted of the following documents:

1. A twelve-page unsigned document entitled "Stipulation and Agreement," which provided in part that an action between the parties pending in the Fifteenth Judicial Circuit of the State of Florida would be dismissed with prejudice.

2. A stipulation of dismissal in one of the cases in the U. S. District Court for the Western District of Pennsylvania (Civil No. 61-131), together with an order of dismissal in that case signed by District Judge Herbert P. Sorg, dated January 22, 1963.

3. A stipulation of dismissal in another case in the Pennsylvania District Court (Civil No. 18265), together with an order of dismissal in that case also signed by Judge Sorg, and also dated January 22, 1963.

These three documents were presented to the clerk of the U. S. District Court for the Southern District of Florida as a "consent judgment," and were bound under one blue cover. The writ of assistance was issued on February 3, 1964, and on February 11, 1964, appellant was placed in possession of the property described in the writ. On March 3, 1964, appellee Greer filed a motion to vacate the

writ of assistance. Appellee Greer also moved to quash the registration of the "judgment" and to expunge the same from the record. On March 5, 1964, the Florida District Court entered the order appealed from, and in the order directed that the writ be rescinded and that the property affected thereby be returned to its prior status. On April 8, 1964, the Florida District Court denied appellant's motion for restoration of writ of assistance pending appeal, declared the registration of the "judgment" to be void *ab initio,* ordered that the registration of the "judgment" be quashed, *nunc pro tunc,* and further ordered that the documents which constituted the "judgment" be expunged from the record. (This latter order produced difficulty when this case was considered by this Court. Having been expunged, the documents were not made a part of the printed record on appeal, and it was necessary that the documents be produced as an appendix to the brief of one of the parties.)

There is no doubt that an order of dismissal may incorporate the terms of a settlement agreement between the parties and thereby constitute a consent judgment entitled to registration under 28 U.S.C.A. § 1963. But under the circumstances of this case, it is unnecessary for us to decide whether the three documents upon which the writ was issued ever constituted a judgment. Because of subsequent developments in the Third Circuit, these documents did not at the time of filing with the District Court below (February 3, 1964) and do not now constitute a consent judgment upon which a writ of assistance may properly issue.

Subsequent to Judge Sorg's January 22, 1963 dismissal orders, appellant became dissatisfied with appellee's performance under the so-called settlement agreement and on March 11, 1963, *herself* moved to vacate the prior dismissal of her two Pennsylvania actions. Judge Sorg on November 13, 1963, denied this motion and appellant ap-

pealed this denial. In Kelly v. Greer, 3rd Cir. 1964, 334 F.2d 434, reversing Judge Sorg, the Third Circuit directed that he vacate his order of dismissal and that he reinstate the two Pennsylvania cases "to the status quo existing immediately prior to the entry of the orders of dismissal, i.e., following the reading into the record of the settlement agreement but prior to the orders dismissing the actions." The Court of Appeals therefore in effect agreed with our appellant that the dismissal orders are to be no longer effective. Accordingly, on remand the orders of dismissal (which form the basis of the alleged "consent judgment" herein) were vacated. As further demonstration that at best there is much doubt on the scope of the asserted incorporation into the consent judgment, the District Judge on remand also refused to incorporate the so-called settlement agreement into a consent judgment, which refusal is now on appeal by appellant to the Third Circuit.

In this confused state of things, all that is clear is that there is not now a "judgment" upon which a writ of assistance may issue. At appellant's own behest the dismissal upon which she attempted to obtain a writ of assistance has been vacated. We thus affirm the Florida District Court's order quashing the writ of assistance. But our affirmance is without prejudice to appellant's right to obtain such a writ in the future, if and when she obtains in her Third Circuit litigation a final judgment affecting the property in Florida.

Affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 816

JANE G. KELLY, Petitioner,

v.

AGNES J. REEVES GREER, MELLON NATIONAL BANK AND TRUST COMPANY, and PITTSBURGH NATIONAL BANK, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

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OCTOBER TERM, 1966

NO. 816

JANE G. KELLY, Petitioner,

v.

AGNES J. REEVES GREER, MELLON NATIONAL BANK AND TRUST COMPANY, and PITTSBURGH NATIONAL BANK, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTIONS PRESENTED

I. Where a United States Court of Appeals ordered judgments of dismissal to be vacated in certain actions in order to restore the District Court's power to enforce a Settlement Agreement and upon Plaintiff's assurance that she would go forward with the settlement if the cases were restored to active status, but, upon remand, Plaintiff refused to perform or to accept performance, demanding instead the right to claim damages for Defendant's alleged breach of the Settlement Agreement, did not the District Court have power summarily to order Plaintiff to go forward with the settlement?

II. Where the mandate of a Court of Appeals requires the entry of a certain order by a District Court, may the filing of a petition for certiorari to review the propriety of the mandated action be delayed until after such an order has been entered by the District Court and thereafter affirmed by the Court of Appeals as a proper compliance with its mandate, or must certiorari be sought within 90 days after the entry of the Court of Appeal's original order?

STATEMENT OF THE CASE

Plaintiff (Petitioner herein) seeks to set aside an Order of the United States District Court for the Western District of Pennsylvania, affirmed and reaffirmed by the Court of Appeals for the Third Circuit. The Order appealed from compels Plaintiff to go forward with a Settlement Agreement which will dispose of litigation which has been pending in federal and state courts in Pennsylvania, Ohio, Florida, Delaware and West Virginia. (I—47a; 108a; 52b-71b)[1]

Plaintiff complains that the Order appealed from deprives her of the right to substitute a claim for money damages for promised performance to which she is entitled under the Settlement Agreement. The history of these proceedings, however, demonstrates (a) that the Order of the court below was a proper exercise of its power summarily to compel parties to a pending lawsuit to carry out the terms of a Settlement Agreement entered into before the Court; (b) that the Order of the court below was itself a proper compliance with the mandate of the Court of Appeals which had issued after an earlier successful appeal by the Plaintiff in these proceedings; and (c) that the Order appealed from in no way interfered with any election of remedy open to Plaintiff. Plaintiff had no choice but to proceed with the Settlement Agreement, especially in view of her express assurances to the Court of Appeals that she

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1. References preceded by Roman Numeral I are to the appendices printed at the first appeal below; those preceded by Roman II are to the appendices printed at the second appeal. Both sets of appendices have been lodged with this Court by Petitioner.

would do so, in reliance upon which that Court had sustained Plaintiff's earlier appeal.

Plaintiff is the adult, married daughter of the individual Defendant, (Respondent herein). The basic controversy, which led to the commencement of a number of lawsuits in several states in the 1950's and early 1960's, grows out of the fact that certain property, including securities, had been registered in the name "Jane Greer" a name by which both mother and daughter have been known. The dispute between them concerns the ownership of such property. (I—28a-29a)

Two lawsuits involving these claims were commenced in 1959 and 1961, respectively, in the Western District of Pennsylvania, where certain of the property had been found in the possession of the two Banks which are named as Defendants in these proceedings.[2] In January 1963, after the two actions had been called for trial, Plaintiff and individual Defendant reached a settlement agreement. A stipulation outlining the settlement was read to the Court and, in accordance with its provisions, Plaintiff dismissed the basic actions with prejudice. (I—43a-51a)

The compromise contemplated not only settlement of the actions then pending in the Western District of Pennsylvania, but of the entire, broad, intra-family dis-

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2. Plaintiff is, and at all times material hereto has been, a citizen and resident of the State of Florida. Defendant is, and at all times material hereto has been, a citizen and resident of the State of West Virginia. Therefore, jurisdiction in the basic actions in the Western District of Pennsylvania was obtained under 28 U.S.C. 1655. (I—11b-13b)

pute. It provided for the transfer of various items of property, for the dismissal of all pending suits, and for the exchange of general releases; but the principal provision of the settlement involved the establishment of two trusts to which the individual Defendant was to transfer a large quantity of stock in two corporations. (I—43a-50a) The agreement provided that the Plaintiff should be the life beneficiary of the first of these trusts, with power in the Trustee to consume principal for her benefit and with a remainder in favor of her children. The individual Defendant was to be the life beneficiary of the second of the trusts, with power to consume principal during her lifetime, and with remainder to the Plaintiff's three sons by her first marriage. (I—44a-46a)

The Settlement Agreement called upon the attorneys for *both* parties by March 1, 1963 to prepare the Trust Indentures and other documents which implementation of the settlement required. The parties contemplated a closing under the Settlement Plan by May 1, 1963. (I—50a)

Soon after the settlement had been agreed to, disagreement arose concerning the settlement itself. Plaintiff's principal complaint against Defendant has been over the failure of the parties to effectuate the dismissal of an action pending in a state court in Florida,[3]

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3. That the Florida suit has not been dismissed is not the fault of this Defendant. As early as February 1963, this Defendant filed a motion asking the Florida Court to dismiss the action with prejudice at her cost. (I—53b) That motion would have permitted the entry of a dismissal in any form acceptable to the Court. The circumstances surrounding the dispute about the dis-

but she has also charged that in February or March of 1963, her mother told her that she did not intend to carry out the Settlement Agreement.[4]

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missal of the Florida action are detailed in Appellee's Appendix in the first appeal. (I—22b-23b) Even during the pendency of the ancillary proceedings, Defendant has indicated her continued willingness to assist in bringing about the dismissal of the Florida action, if Plaintiff would indicate her willingness to go forward with the Settlement Plan. (I—45b)

4. Contrary to the statement made in the Petition for Certiorari (p. 14, ftn. 9) Plaintiff's assertions respecting this conversation have been denied. (I—28b) Moreover, Plaintiff's claim that her mother made such statements in February or March 1963 loses all probative force in the face of the indisputable fact that at the end of March 1963, the Defendant furnished Plaintiff with copies of drafts of the various agreements needed to carry out the Settlement Plan and has repeatedly since solicited Plaintiff's cooperation to consummate the settlement. (I—39b-41b) Plaintiff's own counsel has conceded that Defendant and her counsel have *always* taken the position that the parties should go forward with the Settlement Agreement. (II—5b) Defendant's good faith in these efforts to carry out the settlement since January 22, 1963 is evidenced by the diligence with which she has undertaken the preliminary steps necessary to the accomplishment of the Settlement Plan which calls for the distribution of the great bulk of her extensive holdings. Her accountants and attorneys, acting pursuant to her instructions, have prepared the elaborate trust instruments and other documents needed to carry out the plan and have made accounting studies, prepared deeds, drawn releases, and have done the other things which the Settlement Plan contemplated. (I—33b) In contrast, Plaintiff has contributed nothing to these efforts; she has refused even to cooperate with Defendant's efforts. Although Plaintiff has complained that the draft trust agreements prepared

This has been denied by the Defendant, who insists that she has been at all times ready, willing and able to proceed with the settlement.

It is Defendant's position that Plaintiff became dissatisfied with the settlement, shortly after entering into it, because the bulk of the benefits therein provided for were to be held in trust and would not be subject to her control. Defendant has charged that Plaintiff has engaged in a calculated campaign to sabotage the settlement and to frustrate its purposes in order to substitute a claim for money damages for the mutual benefits which her mother expected to assure herself, her daughter and her grandchildren under the Settlement Plan. (I—19b-21b; 33b-37b)

In April 1963, Plaintiff filed what she designated as an "Ancillary Complaint," at the Term and Number of the actions in the Western District of Pennsylvania which she had dismissed with prejudice about six weeks earlier. In the "Ancillary" Complaint Plaintiff alleged that Defendant had repudiated the Settlement Agreement and demanded damages in the amount of $15,000,000.[5]

Defendant filed a responsive answer, vigorously denying that she was in default under the Settlement

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and submitted by Defendant are inconsistent with the Settlement Plan, she has refused to state the respects in which she believes the drafts should be changed. (I—34b; I—39b-45b)

5. In July 1963, after argument before the Court on the question of the Court's jurisdiction of the first "Ancillary" Complaint, Plaintiff filed a second "Ancillary" Complaint, in effect seeking a declaratory judgment. (I—59a-62a)

Agreement. Among other defenses, the Defendant challenged the Court's jurisdiction over her person because (a) she had never been served with process in the action except pursuant to 28 U.S.C. § 1655, and (b) because the principal actions had been dismissed with prejudice so that there was nothing then pending in the Court to which the Plaintiff's new Complaint could properly be said to be "ancillary." (I—17b-20b) The District Court held that it had no jurisdiction of the claims asserted in the "Ancillary Complaints," grounding its decision upon the fact that the principal actions had been dismissed with prejudice. (I—91a-95a) Plaintiff appealed. When the matter came on for oral argument before Judges McLaughlin, Kalodner and Staley, the Court expressed interest in the Defendant's assertions of her willingness to go forward with the Settlement Plan. (II—11b) In open court, the Court of Appeals explored the possibility of putting the Settlement Plan back on the track, inviting Plaintiff and Defendant to enter into an "ancillary" settlement, as it were, rather than to continue the dispute about whether the conduct of the mother had excused the daughter of her obligations to go forward with the Settlement Plan. (II—12b-13b) Counsel for Defendant had previously asserted his client's willingness to go forward with the Settlement Plan: After a momentary hesitation, counsel for Plaintiff[6] agreed that Plaintiff would also go forward with the settlement, if the proceedings should be restored to the status which they had had immediately before the entry of the judgments of dismissal in the principal actions. (II—15b) The Court of Appeals accepted these assur-

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6. Not her present counsel.

ances as "dispositive" of the appeal (II—15b) and thereafter entered its Order reversing the dismissals of the Ancillary Complaints. It remanded the proceedings to the District Court, with instructions to reinstate the actions to the "status quo existing . . . following the reading into the record of the Settlement Agreement but prior to the orders dismissing the actions." (II—6a-7a)

Notwithstanding the assurances which her counsel had given to the Court of Appeals, Plaintiff refused to go forward with the Settlement Plan. Accordingly, on April 14, 1965, the District Court entered an Order reciting its conclusion "that the parties are bound by the terms of the Settlement Stipulation read into the record on January 22, 1963"[7] and providing that they should begin to effectuate compliance with the Settlement Agreement in accordance with a time schedule

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7. Plaintiff treats this recital as a declaration by the District Court concerning the legal effect of the Agreement as of January 22, 1963 when it was entered into. (see Petition for Certiorari, p. 8, Ftn. 8) This is an incorrect interpretation of the Order. The Court's recital is that the *parties are* bound by the terms of the Agreement. The Order speaks as of its date, namely, April 14, 1965. Thus the Court at that time considered Plaintiff, as well as Defendant, to be bound by the terms of the stipulation. This is in effect a rejection of Plaintiff's contention that she was free to choose not to perform. The Order, thus, is not a declaratory judgment that the settlement stipulation imposed binding obligations when it was entered into; it is a formal rejection by the Court of the Plaintiff's claim that she was free to elect to rescind the obligation and to claim damages for Defendant's alleged breach. The Court's finding is supported by the record.

established in the Order. (II—54a-56a) On appeal, the Court of Appeals held that the Order of the District Court requiring the Plaintiff to go forward with the Settlement Plan was a proper interpretation of the Court of Appeal's mandate on the earlier appeal, and affirmed the Order. After rehearing, it reaffirmed the Order requiring Plaintiff to go forward with the settlement. It is this action which Plaintiff seeks to have this Court review.

ARGUMENT

Summary

The decision of the Court of Appeals is not in conflict with the decision of any other Court of Appeals; and none of the other considerations justifying review on certiorari is present.

Plaintiff has not been compelled against her will to elect specific performance rather than the pursuit of her claim for money damages. At the oral argument on the first appeal, Plaintiff elected to go forward with the Settlement Plan. She obtained the benefits of her election in the form of a reversal of the District Court's earlier judgment and the remand of the proceedings to that Court. Plaintiff cannot now repudiate her choice and, at the same time, retain the benefits thereof.

This case presents a routine application of ordinary principles of waiver of breach; of election of remedy by Plaintiff's deliberate choice. It involves an ordinary illustration of the right of a Court summarily to enforce a settlement agreement made before it. The Order appealed from does not conflict with any constitutional or statutory right to a jury trial.

Finally, the application for certiorari is not timely. Plaintiff's basic complaint is with the decision of the Court of Appeals ordering that the proceedings be restored to the "status quo immediately after the settlement had been agreed to and before the basic actions had been dismissed". This Order was made in July 1964, in the first appeal. The Order of the District Court which is involved in the present proceedings was entered pursuant to the mandate of the Court of Appeals after the first appeal. The Petition for Writ of Certiorari is, there-

fore, an untimely attempt to have this Court review a decision of the Court of Appeals made more than two years before the Petition for Certiorari was filed.

I. None of the Considerations Which Make Appropriate Review on Writ of Certiorari Is Present in This Case.

There is not even a colorable conflict between the decision of the Court of Appeals for the Third Circuit which is sought to be reviewed and the decision of the Court of Appeals for the Fifth Circuit in *Kelly v. Greer*, 354 F.2d 209. The two decisions, rather than being in conflict, are entirely harmonious. All that the Court of Appeals for the Fifth Circuit has determined is that Plaintiff's rights under the Settlement Agreement must be definitively decided in the pending case in the Third Circuit. There is no conflict of any kind between the determinations of the two Courts.

Plaintiff's contention that she has been deprived of her constitutional or statutory right to a jury trial of her claim for damages requires more serious attention, but is likewise without merit.

The plain answer to Plaintiff's contention is that the choice of remedy was not made for her by the Court; she made the election herself. Plaintiff's argument ignores the crucial fact that the favorable outcome of her earlier appeal was the product of the assurances of her counsel to the Court that if the cause was remanded to the District Court, Plaintiff would go forward with the Settlement Agreement. Plaintiff is attempting to retain the benefits she derived from these assurances but to repudiate the condition on which they were given.

Argument.

The settlement agreed to before the District Judge on January 22, 1963 and again before the Court of Appeals at the oral argument on the earlier appeal may be summarily enforced, consistently with established law. *May v. LeClaire, et al.*, 78 U.S. 217 (1871); *Hullet, Inc. v. Universal C.I.T. Corp.*, (10th Cir. 1958) 259 F.2d 685; *All States Investors, Inc. v. Bankers Bond Co.*, (6th Cir. 1965) 343 F.2d 618, cert. den. 382 U.S. 830, rehearing den. 382 U.S. 922; *Main Line Theatres, Inc. v. Paramount Film Distrib. Corp.* (3rd Cir. 1962) 298 F.2d 801, cert. denied 370 U.S. 939; *Cummins Diesel Michigan, Inc. v. The Falcon,* (7th Cir. 1962) 305 F.2d 721; *Ingalls Iron Works Co. v. Ingalls et al.* (D.C.N.D. Ala. S.D. 1959) 177 F. Supp. 151, aff'd. 280 F2d 423.

As stated in *Cummins Diesel Michigan, Inc.*, at 305 F.2d 723:

> "Federal and state courts have held under a great variety of circumstances that a settlement agreement or stipulation voluntarily entered into cannot be repudiated by either party and will be *summarily* enforced by the court." (Emphasis added)

This Court in *May v. LeClaire,* supra, recognized this principle, stating:

> ". . . According to the face of the proposition it involved the settlement of unadjusted demands on both sides. It was made in a spirit of peace and compromise, and was accepted in a corresponding spirit. It is the duty of a court of equity to uphold such an agreement, to protect and enforce the rights of both parties under it, and to carry it out as far as the facts, which subsequently occurred,

and the settled principles of our jurisprudence, will permit." (20 L.Ed. at p. 52)

In a case such as this, the Courts have broad equitable powers not only to enforce an agreement entered into before the Court, but also to make appropriate modifications therein, to adapt the agreement to the intentions of the parties, without their express consent. *English v. Cunningham,* (D.C. Cir. 1959) 269 F.2d 517, cert. den. 361 U.S. 897, 905, rehearing den. 361 U.S. 950; *U. S. v. Jacobs,* (4th Cir. 1961) 298 F.2d 469; *Leathers' Sons v. Goldman,* (6th Cir. 1958) 252 F.2d 188.

Nor should it be overlooked that the relief sought by Plaintiff required the opening of a judgment. The Court had the power to impose reasonable and just conditions on the granting of such relief. F.R.C.P. 60(b); *U. S. v. Gould,* (5th Cir. 1962) 301 F.2d 353; *Bridoux v. Eastern Air Lines, Inc.,* (D.C. Cir. 1954) 214 F.2d 207, cert. den. 348 U.S. 821. The Court of Appeals and the District Court were both justified in treating Plaintiff's conduct as evidencing her assent to an Order conditioned upon her going forward with the settlement.

The Order may also be sustained as an application of the rule of waiver of breach or election. *Acme Process Equipment Co. v. U. S.,* (Ct. of Claims 1965), 347 F.2d 509, cert. granted 384 U.S. 917; *Lichter v. Goss,* (7th Cir. 1956) 232 F.2d 715.

This case, while it involves an unusual fact situation and issues of importance to the parties, does not present an appropriate instance for the issuance of Writ of Certiorari, under the considerations by which the exercise of this Court's discretion is normally measured.

II. The Application for Certiorari Is Untimely.

The Order of the District Court entered on April 14, 1965 was entered in accordance with the mandate of the Court of Appeals for the Third Circuit, issued on September 21; 1964 pursuant to its Order of July 20, 1964. (II—37a) The Court of Appeals has held in the second appeal that the District Court correctly interpreted its mandate. *Kelly v. Greer,* 365 F.2d 669 at 672.

The Order of the District Court entered on April 14, 1965 involved a matter about which it had no discretion. *Ringhiser v. Chesapeake & Ohio Rwy. Co.,* (6th Cir. 1959) 264 F.2d 62. If any review by this Court was desired, certiorari should have been sought from the Order and Mandate of the Court of Appeals on the earlier appeal. *Metropolitan Water Co. v. Kaw Valley Drainage District,* (1912) 223 U.S. 519; *Texas & Pacific Rwy. Co. v. Anderson,* (1893) 149 U.S. 237; *Aspen Mining & Smelting Co. v. Billings* (1893) 150 U.S. 31.

In these circumstances, the present application for review on certiorari is out of time.

Respectfully submitted,

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